80-1247

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No.: _____

IN THE

Supreme Court of the United States

October Term, 1980

CON ERRICO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 23, 1981

Questions Presented

1. Whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*?

List of Parties

There are no parties to this action other than those named in the caption.

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No.: _____

IN THE

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October Term, 1980

CON ERRICO,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Con Errico respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction entered against him by the United States District Court for the Eastern District of New York.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto at pages 1a-9a. No opinion on the issue raised herein was rendered by the District Court for the Eastern District of New York.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was December 1, 1980, which was also the date of entry. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Statutory Provisions Involved in the Case

These are set forth in the appendix at p. 10a.

Statement of the Case

Petitioner was convicted after jury trial of a one-count indictment charging a violation of Title 18 U.S.C. § 1962(c) (RICO). Upon his conviction, Errico was sentenced to a ten-year prison term. At present, he is at liberty on bail pending this application for writ of certiorari by order of the United States Court of Appeals for the Second Circuit.

The theory of the Government's case was that Errico served as an integral part of a group of individuals who conspiratorially associated together for the purpose of "fixing" horse races at two New York Race Tracks during 1974 and 1975. This group or "enterprise" consisted of jockeys who were paid to hold back their horses, Petitioner Errico, who, along with another jockey, Eddie Belmonte, was alleged to have actually paid the jockeys, and several bettors who wagered in a pattern consistent with the "sting."

For purposes of the RICO statute, there was no *legitimate* enterprise involved. The indictment charged that

> The enterprise, as defined by Title 18 U.S.C., § 1961(4), consisted of a group of individuals associated in fact to fix by means of bribery horse races at various pari-mutual thoroughbred horse racing tracks in the State of New York and to profit therefrom by wagering on the fixed races.

The Government's proof at trial showed no more. Thus, this case represents a classic example of a RICO charge where the elemental enterprise was nothing more than an illegal conspiracy dressed up to satisfy the requirements of this pervasive statute.

Reasons for Granting the Writ

There is little need to dwell on the issue presented by this petition: whether a group of individuals associated in fact to commit unlawful activities for profit can constitute an "enterprise" under the RICO statute. It is one that has caused a split among the circuits. Compare, *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980); *United States v. Turkette*, ____F.2d____ (1st Cir. 1980); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976) (per curiam), *cert denied*, 429 U.S. 1039 (1977); *United States v. Sutton*, ____ F.2d ____ (6th Cir. December 3, 1980) (*en banc*); *United States v. Provenzano*, 620 F.2d 985 (3rd Cir. 1980); *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980); *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978). It is also an issue on which the Government has sought certiorari in the *Turkette* case. Indeed, in the instant case, the Circuit Court of Appeals expressly stated that "the issue is one for the Supreme Court, since the other circuits are divided on the point." (Slip. Op. p. 430).

The only characterization of the RICO statute by this Court states that it "seeks to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity." *Ianelli v. United States*, 420 U.S. 770, 787 n. 19 (1975). This view certainly seems consonant with the theme that runs strongly through the first two subsections of 18 U.S.C. § 1962. Subsection (a) is plainly drafted with a design to criminalize the investment of racketeering profits in existing enterprises. Similarly subsection (b) is aimed at acquiring an interest in an existing enterprise through a pattern of racketeering activity or the collection of unlawful debts. Hence, the first two subsections contemplate that an enterprise pre-exists, independent of and apart from the racketeering activity, and would thus seem to be aimed exclusively at the infiltration of legitimate business. Otherwise a gang of criminals who put their loot into a hole in the ground might be committing a RICO offense under § 1962(a) or (b) and nobody has yet suggested so extraordinary a holding.

The only possible basis for concluding that purposive racketeering activity is itself an enterprise is § 1962(c). Yet, this part of the statute only offers a logical possibility, not an authoritative answer. Under the principles of *noscitur a sociis* and *in pari materia*, there is substantial reason for claiming that this subsection should be read in the spirit of the first two. Supporting this view is the fact that the legislative history of RICO does not contain one word of support for a broad view of the "enterprise" requirement. If these considerations are not conclusive, they certainly show the rampant ambiguity of the statute.

This case, which contains an uncomplicated one-count RICO charge, is a perfect case to resolve this very important interpretational issue. Resolution of this case by the Court will squarely resolve the swelling controversy which continues to envelope this very important statute.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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January 23, 1981

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 229—September Term, 1980

(Argued September 29, 1980
Decided December 1, 1980)

Docket No. 80-1255

UNITED STATES OF AMERICA,

Appellee,

-against-

CON ERRICO,

Appellant.

Before:

LUMBARD, OAKES and NEWMAN,

Circuit Judges.

Appeal from a conviction upon a jury trial in the District Court for the Eastern District of New York, Weinstein, *C.J.*, for one count of racketeering in violation of 18 U.S.C. § 1962(c)(1976).

Affirmed.

Appendix A
Opinion of United States Court of Appeals

GERALD L. SHARGEL, ESQ., New York, N.Y. (Richard Ben-Veniste, Esq., Melrod, Redman & Gartlan, Washington, D.C.; Albert J. Brackley, Esq., Brooklyn, N.Y., of counsel, *for Appellant.*

EDWARD AGNEW McDONALD, Assistant Attorney-in-Charge, Eastern District of New York (Edward R. Korman, United States Attorney, Eastern District of New York; Thomas P. Puccio, Attorney-in-Charge, U.S. Dept. of Justice, Organized Crime Strike Force, Eastern District of New York; Neil Jon Firetog, Special Counsel, of counsel), *for Appellee.*

LUMBARD, *Circuit Judge*:

Con Errico appeals from his conviction after a jury trial in the Eastern District of New York, Chief Judge Weinstein presiding, on one count of violating the Racketeer Influenced and Corrupt Organization (RICO) statute, 18 U.S.C. § 1962(c)(1976).[1] Errico argues that the government introduced insufficient evidence to establish a RICO enterprise and that we should overturn *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1039 (1977), which interprets RICO to include the activities of both legitimate and illegitimate enterprise. We reject these arguments and affirm Errico's conviction.

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[1] Chief Judge Weinstein sentenced Errico to a ten-year prison term and fined him $25,000.

Appendix A
Opinion of United States Court of Appeals

I

The New York Racing Association, a private company operating three thoroughbred racetracks in New York, began during the 1970's to offer multiple-horse wagers on certain races. In an exacta race, a winning bettor must pick both the winner and the second-place horse. In a trifecta, the winning bettor must pick the first three horses in exact order. Although a bettor's chances of winning in any race are increased if the bettor knows that certain horses will not place, the higher stakes in these combination wagers make race-fixing particularly profitable, since bets on all combinations of other horses will cost far less than the payoff on the winning combination.

In 1973, track officials became aware of unusual betting patterns through examinations of their computer records, alerting them that a bribing-and-betting scheme may have been at work. Those computer records displayed a series of large bets on exacta and trifecta races that consistently excluded some horses but covered every possible combination of the others. The ensuing investigation by racetrack officials and the FBI revealed that Errico, a 58-year-old former jockey, was the linchpin of an organization of bribed jockeys and informed bettors who profited by placing high-stakes, combination wagers on fixed races. The government's evidence against Errico came primarily from three sources: testimony of the jockeys to whom Errico offered bribes, surveillance of Errico's meetings with the bettors, and racetrack records revealing each day's big winners.

Errico first approached Jose Amy, a 26-year-old jockey and the government's principal witness, in December of 1973 in the jockeys' locker room of the Aqueduct racetrack. Errico offered to pay Amy to keep his horse out of the money in the trifecta race that day. Amy refused. Errico attempted to bribe Amy again a

few days later but met the same refusal. On March 5, 1974, Errico tried a third time more aggressively. He told Amy that the other jockeys had agreed to hold horses and then threatened "Mafia" retribution should Amy refuse him again. A frightened Amy agreed to hold his horse, and Errico gave him $1,500 in cash. Two or three weeks later, Amy held his horse again for another $1,500.

The month of August, 1974, when the Racing Association held its races at its Saratoga track, was a busy month for Errico's operation. He bribed Amy on two occasions, August 2 and 6. Eddie Belmonte, a jockey who operated on Errico's behalf, convinced jockey Ben Feliciano to hold horses for pay; Feliciano received $2,500 for an August 10 race and $5,000 for an August 24 race. Errico did find one jockey that month who could not be bought. Errico offered Michael Venezia $7,500 to hold a horse in a trifecta race, telling him that the "Latin American riders" were making "a good deal of money." Venezia nevertheless refused.

Those jockeys who joined Errico's circle of jockeys, however, made substantial profits possible for his circle of bettors. Internal Revenue Service Form 1099 must be filled in at the track by bettors who win more than $600 on a race, and thus the racetrack's copies of the forms reveal the identities of the big winners for each race. On August 2, 1974, Harry Kachougian won $91,560 and Salvatore Gannuseio won $45,780 on the trifecta that Errico payed Amy to fix. Track records for that day also reveal—consistent with Errico's technique of selective betting—that $35,000 had been bet on numerous combinations, all of which had excluded the horses ridden by Amy and other jockeys that Amy had identified as part of Errico's circle: Angel Cordero, Eddie Maple, and Jorge Velasquez.

On the August 6 trifecta race, another race Errico paid Amy to fix, Kachougian won another $109,055 and Harold Hirsch won $13,155. The large bets that day excluded horses ridden by Amy and two other jockeys in league with Errico: Eddie Belmonte and Jamie Arellano. On August 20, 1974, the big bettors in the exacta race, which Errico had paid Feliciano to fix, excluded horses ridden by Feliciano, Cordero, and Marco Castenada, another Errico-corrupted jockey. Castenada, however, fouled Errico's system that day by finishing in the money; accordingly, there are no records of Errico's wagering colleagues winning big. However, an agent for the Thoroughbred Racing Protective Bureau, the track security force, observed Kachougian, Richard Perry, and Gaythorn Angell betting that day.

By November and December of 1974, the races had returned to the Aqueduct track and the FBI had begun a more extensive surveillance of bettors linked with Errico. Amy testified that he received $1,500 from Errico for each of three trifecta races in which he held his horse in those two months: November 22, December 6, and December 9, 1974. The track records reveal that Harold Hirsch collected $77,570 from the December 6 trifecta, and Kachougian collected over $129,000 from the December 9 trifecta. On both days, the major combination bettors excluded horses ridden by Errico-corrupted jockeys.

The FBI, meanwhile, was observing the other end of Errico's operation: his relations with his bettors. In late November, 1974, Kachougian, Hirsch, Angell, Charles Garabedian, and David Berger rented rooms 402, 404, 406 and 410 of a Howard Johnson's Motor Lodge quite close to Aqueduct. On November 22, Errico spent fifteen minutes in that hotel immediately before

directing Amy to hold his horse in the ninth race. At the end of that day, Errico met with Angell there for thirty minutes.

During the next few days, the bettors moved across the street to the Hilton Inn. On November 25, Errico met with Garabedian and Berger in their car in the Hilton parking lot. On December 6, the FBI watched Kachougian spend thirty minutes placing combination bets at Aqueduct and then saw Garabedian, Hirsch, and Berger join him. On December 7, the FBI agents rented rooms at the Hilton across the hall from the bettors; from that close range, they observed Errico entering one of the rooms registered to Kachougian, Garabedian, and Hirsch and then leaving eighteen minutes later. On December 9, Errico met with Angell and another man for several hours in the bar at Howard Johnson's. Angell and the other man had initially arrived in the company of Berger and Hirsch.

March 24, 1975 is the final date for which the government offered evidence of Errico's operations and is a crucial date for purposes of the five-year statute of limitations, 18 U.S.C. § 3282(1976). Amy testified that, on that day, Errico approached him in the Aqueduct jockeys' room and then paid him $1,500 for holding his horse in the final race. Most of the track records for that day had been destroyed, but the IRS records reveal a $19,000 winner who collected those winnings under a fictitious name.

Errico was indicted for a one-count RICO violation, on March 21, 1980. He moved to dismiss the indictment before trial on the ground that it failed to allege facts sufficient for an enterprise under RICO. Judge Weinstein denied the motion and directed the jury that "enterprise" means "any group of individuals associated in fact, although not a legal entity, a corporation, or partnership

. . . You may find that a group of individuals joined together to fix horse races is an enterprise as defined by this section. That enterprise must continue in an essentially unchanged form during substantially the entire period charged in the indictment . . . Essentially unchanged. It doesn't mean everybody has to be the same. Essentially, the core of it has to be the same throughout the period."

Because of the statute of limitations, the government had to prove that Errico bribed Amy on March 24, 1975, since this was the only overt act alleged within the limitations period. In his defense, Errico presented alibi testimony that he had been in California recuperating from facial cosmetic surgery on March 24; but he did not take the stand himself.

We hold that the charge accurately states the RICO standard and that the government's case amply satisfies that standard.

II.

The RICO statute, 18 U.S.C. § 1962(c)(1976), makes it unlawful for "any person employed by or associated with any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The term "enterprise" is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4)(1976). The defendant does not dispute the jury's finding that he was engaged in a "pattern of racketeering activity" under the standards of 18 U.S.C. § 1961(5)(1976) and N.Y. Penal Law § 180.40 (McKinney's 1975). He does,

however, challenge the adequacy of the government's evidence of a RICO enterprise. That challenge takes two forms. First, Errico proposes that this court overturn its holding in *United States v. Altese, supra*, which interprets RICO to include thoroughly illegitimate, as well as partially legitimate, enterprises. Second, he argues that there was insufficient evidence of a unified enterprise to support a RICO conviction. We reject both of Errico's arguments.

First, we see no need in the present context to reevaluate our holding in *United States v. Altese, supra.*[2] The district court in *Altese* interpreted RICO as a restriction only upon illegal activities of legitimate businesses and thus dismissed a RICO indictment based on the racketeering activity of a large-scale gambling enterprise. This court reversed, holding that "all enterprises that are conducted through a pattern of racketeering activity . . . fall within the interdiction of the Act." *Id.* at 106. At that time, we saw no Congressional intent to restrict RICO to legitimate enterprises. The issue is one for the Supreme Court, since the other circuits[3] are divided on the point. As a panel, we are bound by *Altese.*

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[2] Errico's motion to dismiss gives only the vaguest hint that he sought reversal of *Altese.* However, because this argument affects the applicability of the statute under which he was convicted, we reach the merits of the argument under the doctrine of *United States v. D'Amato*, 507 F.2d 26 (2d Cir. 1974).

[3] *See United States v. Rone*, 598 F.2d 564 (9th Cir. 1979); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). *Contra, United States v. Turkette*, ____ F.2d ____, Nos. 79-1545, 79-1546 (1st Cir. Sept. 23, 1980); *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated and rehearing en banc granted*, Nos. 78-5134 to 5139, 5141 to 5143 (6th Cir. Nov. 7, 1979) (rehearing held Apr. 2, 1980); *United States v. Anderson*, ____ F.2d ____, No. 1809 (8th Cir. Aug. 7, 1980). *See also United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Moeller*, 402 F.Supp. 49, 58-60 (D.Conn. 1975).

Second, we reject Errico's claim that his network of jockeys and bettors failed to constitute an enterprise for RICO purposes. The definition of "enterprise" in 18 U.S.C. § 1961(4), *supra*, includes any "group of individuals associated in fact." Although we are aware that RICO should not be extended so as to sweep into the federal net all racketeering activities outlawed by state law, *see United States v. Huber*, 603 F.2d 387, 395-96 (2d Cir. 1979), Errico's organization here satisfies RICO's enterprise requirement. A circle of jockeys—including Amy and others—who were joined through Errico with a circle of bettors—including Kachougian, Hirsch, Angell, and Berger—regularly attempted to profit and did profit from the illegal fixing of races. The two circles came together and continued to operate with that single, illegal purpose from at least August, 1974 through March 24, 1975. That community of interest and continuing core of personnel provides the "group of individuals associated in fact" that is required for a RICO conviction. *See United States v. Wesman*, 624 F.2d 1118 (2d Cir. 1980).

Thus, Errico's organization was an enterprise that was unlawful under RICO and we affirm his conviction.

Appendix B
Constitutional and Statutory Provisions Involved in the Case

CONSTITUTION OF THE UNITED STATES

AMENDMENT FIVE
(in pertinent part)

No person shall be . . . deprived of life, liberty or property, without due process of law.

STATUTORY PROVISIONS

18 U.S.C. § 1962 (c) and (d)

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Federal Rules of Criminal Procedure, Rule 14
(in pertinent part)

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

28 U.S.C. § 1254(1)

Court of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

No. 80-1247

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ALEXANDER L. S
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OCTOBER TERM, 1980

CON ERRICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1247

CON ERRICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his conduct did not come within the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. III) 1961 *et seq.*

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c). He was sentenced to 10 years' imprisonment and a fine of $25,000. The court of appeals affirmed (Pet. App. 1a-9a).[1]

The evidence adduced at trial is summarized in the opinion of the court of appeals (Pet. App. 1a-7a). In brief, it showed that petitioner, a former jockey, was the "linchpin" (*id.* at 3a) of an association of jockeys and bettors organized for the purpose of fixing horse races at New York racetracks

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[1]The opinion of the court of appeals is reported at 635 F. 2d 152.

and wagering on the fixed races. The association remained in operation from at least December 1973 through March 1975.

In December 1973, petitioner approached jockey Jose Amy[2] at Aqueduct racetrack and offered to pay him to keep his horse out of the money in the trifecta race that day.[3] Amy refused. A few days later petitioner again unsuccessfully attempted to bribe Amy. Finally, petitioner told Amy that the other jockeys had agreed to hold horses, and he threatened "Mafia" retribution if Amy did not go along. Frightened by these threats, Amy agreed to cooperate, and petitioner paid him $1500 (Pet. App. 3a-4a).

During the next 16 months, petitioner bribed Amy and other jockeys to hold their horses on several occasions. By doing so, the jockeys made it possible for petitioner's circle of bettors to win substantial sums of money by betting on numerous trifecta combinations, all of which excluded the horses ridden by the bribed jockeys (Pet. App. 4a-5a).[4]

2. Petitioner contends (Pet. 3-4) that the conduct for which he was convicted does not fall within the RICO statute. He argues that RICO applies exclusively to legitimate "enterprises" that are subsequently infiltrated by criminal elements, and thus does not extend to the wholly illegitimate association of jockeys and bettors that was charged as the "enterprise" in this case.

---

[2]Amy was the government's principal witness at trial.

[3]In a trifecta race, the winning bettor must pick the first three horses in exact order; accordingly, a bettor's chances of winning in any race are increased if he knows that certain horses will not place.

[4]For example, in the trifecta at Saratoga racetrack on August 2, 1974, Harry Kachougian won $91,560, and Salvatore Gannuseio won $45,780. In the December 6 trifecta at Aqueduct, Harold Hirsch collected $77,570, and in the December 9 Aqueduct trifecta Kachougian collected more than $129,000 (Pet. App. 4a-5a).

The issue raised here—whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an "enterprise" under RICO—is currently before this Court in *United States* v. *Turkette*, cert. granted, No. 80-808 (Jan. 26, 1981). Accordingly, consideration of this petition should be deferred pending the Court's decision in *Turkette*.[5]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

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[5]We also note that, as in *Turkette* (see U.S. Br. at 41-42 n.32), the illegal association in this case had a predatory effect on a legitimate business—here, the business of horse racing in New York. Unlike *Turkette*, however, petitioner's operation entailed the actual infiltration of the racing business through bribery of jockeys who were integral participants in that business. For this reason, even if the Court narrowly construes the RICO statute in *Turkette*, there would remain the question whether RICO is applicable to the corruption of the legitimate racing industry involved in this case. That issue, if necessary to be resolved after *Turkette*, should properly be considered by the court below in the first instance. See, *e.g.*, *Busic* v. *United States*, 446 U.S. 398, 412 n.19 (1980).